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## **SECTION C**

### **GENERAL REQUIREMENTS**

#### **CHAPTER 4**

#### **CONFORMITY LAPSE AND FREEZE**

The following Chapter presents an overview of circumstances under which lapsing of an MPO's conformity determination on a transportation plan/TIP may occur, as well as the associated consequences for both Federal-aid and non Federal-aid highway and transit projects that may be affected by a conformity lapse situation. Conformity lapse is defined in the transportation conformity rule as follows:

*.40 CFR §93.101, as amended by 62 FR 43802, Aug. 15, 1997*

*"Lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan/TIP."*

During a conformity lapse, the MPO's conformity determination for a transportation plan or TIP is no longer valid. Only certain types of projects can advance during a conformity lapse and these are discussed in detail later in this chapter.

Under the transportation conformity rule, a conformity lapse may be caused by several different and unique situations discussed below related to: 1) not meeting the required three-year period for conformity redetermination of an MPO's transportation plan or TIP; 2) certain SIP consequences; or, 3) not meeting one of the other triggers for conformity redetermination within 18 months of rule changes, SIP submittal, SIP approval, TCM revision, or revised budget.

#### **MARCH 2, 1999 COURT RULING ON CONFORMITY LAPSE**

The March 2, 1999 Court ruling (U.S. Court of Appeals for the District of Columbia Circuit) issued an opinion on three key provisions of the August 15, 1997 Conformity Rule related to conformity lapse. These provisions are: 1) the provision allowing grandfathered projects (previously conformed projects) to proceed during a conformity lapse; 2) the provision allowing certain regionally significant non-federal projects to proceed during a conformity lapse; and, 3) the provision allowing a conformity grace period for 120 days after EPA disapproval of a SIP without a protective finding. The EPA has issued guidance<sup>1</sup> which addresses implementation of conformity requirements consistent with the Court ruling and will be formalizing the guidance by proposing and ultimately finalizing amendments to the conformity rule. Each of these three issues related to conformity lapse are discussed in detail in the corresponding sections of this Chapter.

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<sup>1</sup>Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision, U.S. EPA, May 14, 1999.

## STATUTORY REQUIREMENTS RELATED TO CONFORMITY LAPSING

The 1990 CAA requires that conformity be determined for transportation plans and TIPs every three years; in fact the law states that conformity procedures and criteria must:<sup>2</sup>

*“Address the appropriate frequency for making conformity determinations, but in no case shall such determinations for transportation plans and programs be less frequent than every three years...”*.

In addition, the CAA requires that only those transportation projects may be adopted or approved or found in conformity by an MPO or any recipient of Title 23 or Federal Transit Act funds, or accepted or funded by the U.S. DOT that meet the following criteria:

*“(i) such a project comes from a conforming plan and program;  
(ii) the design concept and scope of such project have not changed significantly since the conformity finding regarding the plan and program from which the project derived; and,  
(iii) the design concept and scope of such project at the time of the conformity determination for the program was adequate to determine emissions.”*<sup>3</sup>

## TRANSPORTATION CONFORMITY RULE PROVISIONS RELATED TO CONFORMITY LAPSING

The transportation conformity rule provides the criteria and implications of conformity lapse situations for MPOs’ transportation plans, TIPs and projects. Conformity lapses may be created under two different scenarios: 1) due to failure to make a new conformity determination in accordance with the provisions and schedules in the rule; or, 2) as consequences of certain SIP failures. These scenarios are presented within the transportation conformity rule as follows:<sup>4</sup>

### §93.104 Frequency of conformity determinations.

#### *(b) Frequency of conformity determinations for transportation plans.*

- (1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT;*
- (2) All transportation plan revisions must be found to conform before the transportation plan revisions are approved by the MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in §93.126 or §93.127. The conformity determination must be based on the transportation plan and the revision taken as a whole;*
- (3) The MPO and DOT must determine the conformity of the transportation plan no less frequently than every three years. If more than three years elapse after DOT’s conformity determination without the MPO and DOT determining conformity of the transportation plan, the existing conformity determination will lapse.*

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<sup>2</sup> 42 U.S.C., Section §176(c)(4)(B)(ii), 1990 Clean Air Act Amendments (CAA).

<sup>3</sup> 42 U.S.C., Section §176(c)(2)(C)(i)(ii)(iii), 1990 Clean Air Act Amendments (CAA).

<sup>4</sup> 40 CFR §93.104, as amended by 62 FR 43804, Aug. 15, 1997.

*(c) Frequency of conformity determinations for transportation improvement programs.*

*(1) A new TIP must be demonstrated to conform before the TIP is approved by the MPO or accepted by DOT;*

*(2) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in §93.126 or §93.127;*

*(3) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, the existing conformity determination will lapse; and*

*(4) After an MPO adopts a new or revised transportation plan, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of DOT's conformity determination for the transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in §§93.126 and 93.127. Otherwise, the existing conformity determination for the TIP will lapse.*

*(d) Projects. FHWA/FTA projects must be found to conform before they are adopted, accepted, approved, or funded. Conformity must be redetermined for any FHWA/FTA project if three years have elapsed since the most recent major step to advance the project (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred.*

Note: Section 93.104(d) is one of the provisions impacted in the March 2, 1999 Court ruling.

*(e) Triggers for transportation plan/TIP conformity determinations. Conformity of existing transportation plans and TIPs must be redetermined within 18 months of the following, or the existing conformity determination will lapse, and no new project-level conformity determinations may be made until conformity of the transportation plan/TIP has been determined by the MPO and DOT:*

*(1) November 24, 1993;*

*(2) The date of the State's initial submission to EPA of each control strategy implementation plan or maintenance plan establishing a motor vehicle emissions budget;*

*(3) EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget;*

*(4) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and*

*(5) EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget or adds, deletes, or changes TCMs.*

§93.120 Consequences of control strategy implementation plan failures.

*(a) Disapprovals.*

*(1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan/TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under section 179(b)(1) of the Clean Air Act. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined;*

*(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming transportation plan/TIP may be found to conform. This means that beginning 120 days after disapproval without a protective finding, no transportation plan, TIP, or project not in the first three years of the currently conforming plan/TIP may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined. During the first 120 days following EPA's disapproval without a protective finding, transportation plan, TIP, and project conformity determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget(s) applies for transportation conformity purposes, pursuant to §93.109; and*

*(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.*

*(b) Failure to submit and incompleteness. In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under Clean Air Act §§179 or 110(m)), the conformity status of the transportation plan/TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under §179(b)(1) of the Clean Air Act, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.*

*(c) Federal implementation plans. If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.*

Note: Section 93.120(a)(2) is one of the provisions impacted in the March 2, 1999 Court ruling.

## **TYPES OF PROJECTS THAT MAY ADVANCE DURING A CONFORMITY LAPSE**

During a conformity lapse scenario, only the following six types of transportation projects may proceed for purposes of funding and implementation<sup>5</sup>:

1. TCMs in Approved SIPs;
2. Non-Regionally Significant Non-federal Projects;

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<sup>5</sup>FHWA/FTA Additional Supplemental Guidance for the Implementation of the Circuit Court Decision Affecting Transportation Conformity, June 18, 1999. See Appendix M.

3. Regionally Significant Non-federal Projects - only if the project was approved by the non-federal entity before the lapse. (See discussion of when regionally-significant non-federal projects are considered to have been approved later in this Chapter.)
4. Previously Conformed Projects - those from a conforming plan/TIP, which have received funding commitments for construction, Plans, Specifications & Estimates (PS&E) approval, Full Funding Grant Agreements (FFGA) or equivalent approvals. When a conformity lapse occurs, Federal-aid active design and right-of-way acquisition projects, except for initial offers, and for hardship acquisition or protective purchases, will be halted.
5. Exempt Projects - identified under 40 CFR §93.126, as amended by 62 FR 43816-17, Aug. 15, 1997 and 40 CFR §93.127, as amended by 62 FR 43817-18, Aug. 15, 1997 of the transportation conformity rule; and,
6. Traffic Synchronization Projects - however, these projects must be included in subsequent regional conformity analysis of MPO's transportation plan/TIP under 40 CFR §93.128, as amended by 62 FR 43818, Aug. 15, 1997 of final rule.

FHWA and FTA issued guidance on June 18, 1999 to clarify the status of Federally-funded design and right-of-way projects in the event of a conformity lapse. Specifically, only those highway projects which have received approval of PS & Es, and transit projects that have received a FFGA, or equivalent approvals, prior to the conformity lapse (or the March 2, 1999 decision, which ever is later) may proceed during a conformity lapse.

Accordingly, the FHWA and FTA cannot continue to fund active highway design and right-of-way acquisition projects (except for exempt activities) during a conformity lapse, regardless of whether or not these projects were approved before the conformity lapse, or court decision. Likewise, funding for active transit design and right-of-way acquisition projects (except for exempt activities) which received a grant, other than a FFGA, may not continue unless: 1) FTA approved the grant before the conformity lapse or court decision, and 2) the grantee has already executed a contract for construction, or for a major capital acquisition like procurement of rolling stock.

Design and right-of-way acquisition for exempt projects contained in 40 CFR 93.126 and 93.127, and TCMs in an approved SIP may continue. This includes engineering and design activities that are necessary to assess social, economic, and environmental effects of the proposed action or alternatives as part of the NEPA process. However, as noted above, FHWA and FTA can not complete the NEPA process (i.e., approve a CE, FONSI, or FEIS) until the area has reestablished conformity.

Please see the June 18, 1999 guidance (Appendix M) for details about projects that are not covered by a PS& E approval, a FFGA, or equivalent approval in areas that are in a conformity lapse.

## **DIFFERENCES BETWEEN HIGHWAY SANCTIONS, CONFORMITY LAPSING, AND CONFORMITY "FREEZE" SCENARIOS**

### **Highway Sanctions**

Highway sanctions occur due to deficiencies involving State Implementation Plans (SIPs) and involve EPA findings of non-submittal, incompleteness, or disapprovals of control strategy SIP submittals required under the CAA. Sanctions are not imposed for maintenance plan failures. Highway sanctions are used for purposes of enforcing deadlines for SIP submittals and the implementation of approved SIP measures or elements required under the CAA. Under §§179(b) and 110(m) of the CAA two types of sanctions are available to the EPA Administrator (mandatory and discretionary) for consideration upon determination of a SIP deficiency.

EPA must impose sanctions through a rule making process. Once an area is notified by EPA of certain SIP deficiencies the sanctions clock is triggered and highway sanctions will be imposed within 2 years. If the SIP failure is corrected by the State, the sanctions clock is stopped. (See the CAA §§179(b) and 110(m) for more specific information on sanctions.) When highway sanctions are imposed, only those specific categories of actions identified as "exempt" under the CAA<sup>6</sup> and those specific categories of actions shown within U.S. DOT's exemption criteria policy<sup>7</sup> may proceed forward toward final construction and implementation (e.g., TCMs such as those included in Exhibit 14 (Chapter 1), planning and research projects, safety programs, and other air quality improvement projects not related to single occupant vehicle (SOV) capacity expansion, etc.). Other "non-exempt" actions (involving air quality improvement programs that do not encourage SOV capacity) may also be found exempt after individual review of each project (by EPA and U.S. DOT) per U.S. DOT's exemption criteria policy.<sup>8</sup>

### **Conformity Lapse**

Conformity lapses occur as a consequence of control strategy implementation failures or failure to demonstrate conformity within specific time frames. Conformity lapses due to control strategy implementation failures occur when highway sanctions associated with those failures are imposed. Lapses as a result of plan/TIP deficiencies or failures would occur according to the rule's frequency requirements (see Chapter 1). Failure to meet specified time frames takes effect at the point that the previous conformity determination lapses. For example, conformity lapsing may occur at the local level due to the MPO not meeting the deadlines for redetermination of conformity for transportation plans and programs (every three years). In addition, certain SIP-related deficiency findings by EPA (such as a disapproval of a submitted SIP without a protective finding)<sup>9</sup> may also trigger conformity lapsing.

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<sup>6</sup> 42 U.S.C. §179(b)(1)(B), 1990 Clean Air Act Amendments (CAA).

<sup>7</sup> 61 FR 14363, FHWA's Exemption Criteria Policy for Highway Sanctions, Apr., 1996.

<sup>8</sup> 61 FR 14371, FHWA's Exemption Criteria Policy for Highway Sanctions, Apr., 1996.

<sup>9</sup> 40 CFR §93.120(a)(2), as amended by 62 FR 43813, Aug. 15, 1997.

40 CFR §93.101, as amended by 62 FR 43803, August 15, 1997

*Protective finding means a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan was submitted, such as reasonable further progress or attainment.*

## **Conformity Freeze**

A disapproval of a SIP without a protective finding results in a freeze after EPA's final disapproval is effective. A freeze precludes any new plan or TIP conformity findings from being made until the State submits a new SIP and EPA finds the motor vehicle emissions budgets adequate. If adequate budgets are not in place in time, the freeze will turn into a lapse in conjunction with the imposition of highway sanctions which normally occurs two years after the SIP disapproval without a protective finding.

## **CONSEQUENCES OF SIP DISAPPROVALS WITH A PROTECTIVE FINDING**

EPA clarified the definition of a "protective finding" in the 1997 conformity amendments to the transportation conformity rule as noted above.<sup>10</sup> EPA would not give a protective finding to a SIP in which emission reduction measures or commitments are inadequate to achieve the required RFP or attainment.<sup>11</sup>

Consequences of a SIP disapproval apply after control strategy SIPs (including 15% SIPs, post-1996 SIPs, and attainment demonstrations) have been disapproved by EPA. When disapproving a control strategy SIP revision, EPA may give the SIP a "protective finding" if certain conditions are met as discussed above. If EPA disapproves a SIP but gives a "protective finding", the motor vehicle emissions budget in the disapproved SIP could still be used to demonstrate conformity *so long as EPA finds the budget adequate for conformity purposes* (See Section B for discussion of adequacy process and criteria). There would be no adverse conformity consequences unless highway sanctions were imposed, as is the case with respect to all other SIP planning failures. Highway sanctions would be imposed 24-months following the effective date of EPA's disapproval if the SIP deficiency had not been remedied. The conformity of the plan/TIP would also lapse once highway sanctions were imposed.<sup>12</sup>

## **CONSEQUENCES OF SIP DISAPPROVALS WITHOUT A PROTECTIVE FINDING**

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<sup>10</sup> 40 CFR Part 93, 62 FR 43796-43797, Aug. 15, 1997.

<sup>11</sup> 40 CFR Part 93, as amended by 62 FR 43796, Aug. 15, 1997.

<sup>12</sup> 40 CFR Part 93, as amended by 62 FR 43796, Aug. 15, 1997.



In accordance with the March 2, 1999 Court ruling, in the cases where EPA disapproves a control strategy SIP and does not give it a protective finding, the only transportation projects that could go forward would be those included in the first three years of the transportation plan/TIP (See discussion of conformity freeze above). No new plans, TIPs, or plan/TIP amendments could be found to conform thus causing a "freeze" on any new transportation plans/TIPs or projects.<sup>13</sup> Further, no additional projects not already in the first three years of the plan/TIP could be found to conform. Since exempt projects do not require conformity determinations, they could proceed at any time.

If any one phase of a project is included in the first three years of the currently conforming plan/TIP, all subsequent phases could proceed following a disapproval, provided that all phases of the project were included in the plan/TIP conformity analysis and all other applicable project-level conformity criteria were satisfied (e.g., hot-spot requirements). A project phase in the plan could not be moved into the first three years of the TIP during a freeze, since a plan/TIP amendment would be required. Plan/TIP amendments cannot be approved during a freeze. The "freeze" on new transportation plans, TIPs, and projects would be removed once an area submits another control strategy SIP to replace the disapproved SIP, and EPA finds the budget adequate. If such a replacement SIP does not apply for conformity purposes by the time CAA highway sanctions are imposed (two years after EPA's final disapproval), conformity would lapse, and no new project-level conformity determinations could be made, even for projects in the first three years of the plan/TIP. The lapse would last until a replacement SIP applies for conformity purposes (i.e., until an adequate replacement SIP has been submitted to EPA and EPA finds the budgets adequate<sup>14</sup>). Sanctions would apply until the State had corrected the SIP failure.

### **Effective Date of Conformity Freeze After SIP Disapproval Without a Protective Finding**

A disapproval of a SIP without a protective finding results in a freeze beginning on the effective date of EPA's disapproval. EPA believes it can still effectively provide transportation agencies a short time period prior to the impacts of a conformity freeze. EPA has administrative discretion to make disapprovals of control strategy SIPs effective 60-90 days after the publication of the disapproval in the Federal Register. A conformity freeze would start upon the effective date of the disapproval. EPA believes such a delayed effective date is appropriate to allow transportation agencies to complete conformity determinations that were well underway when EPA disapproves a SIP without a protective finding.

### **ALIGNMENT OF CONFORMITY LAPSES AND HIGHWAY SANCTIONS**

The transportation conformity rule aligns the dates of conformity lapses (i.e., halting conformity determinations for new Federally funded highway/transit projects, plans/TIPs) due to SIP failures with the application of CAA highway sanctions for areas with incompleteness and failure to submit findings and all areas with disapproved SIPs with or without a protective finding. In particular, the August, 1995,

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<sup>13</sup> 40 CFR §93.120(a)(2), as amended by 62 FR 43813 and 62 FR 43796-7, Aug. 15, 1997.

<sup>14</sup> 40 CFR Part 93, as amended by 62 FR 43796, Aug. 15, 1997.

amendments to the transportation conformity rule (60 FR 40098) affected ozone nonattainment areas with an incomplete 15% SIP (with a protective finding); incomplete ozone attainment/3% rate-of-progress SIP; or finding of failure to submit an ozone attainment/3% rate-of-progress SIP; and areas whose control strategy implementation plan for ozone, carbon monoxide, particulate matter, or nitrogen dioxide is disapproved with a protective finding. Under the revised transportation conformity rule, the conformity status of the transportation plan and program will not lapse as a result of such failure until highway sanctions for such failure are effective under the Clean Air Act.<sup>15</sup>

The November, 1995, transportation conformity rule amendments (60 FR 57179) aligned the date of conformity lapses with the date of application of CAA highway sanctions for any failure to submit or submission of an incomplete control strategy SIP. In particular, the November 1995 amendments affected the alignment of conformity lapses with the application of highway sanctions as a result of failure to submit or submission of an incomplete ozone, carbon monoxide (CO), PM-10, or a nitrogen dioxide (NO<sub>2</sub>) control strategy SIP. Therefore, a conformity lapse as a result of these SIP failures is delayed until the CAA§179(b) highway sanctions are applied.<sup>16</sup> The August 1997 conformity amendments aligned conformity lapses from SIP disapprovals without a protective finding with the date of application of CAA highway sanctions.

#### **STATUS OF TCMs FROM APPROVED SIPs DURING A CONFORMITY LAPSE**

The EPA's November, 1995, transportation conformity rule amendments allowed any transportation control measure (TCM) from an approved SIP to proceed during a conformity lapse. EPA stated that it did not intend to approve SIPs containing TCMs that have not been formally coordinated through the FHWA/FTA statewide and metropolitan transportation planning processes, as required by 23 CFR Part 450 or the Federal Transit Act. EPA will not approve such SIPs because both the CAA and TEA-21 require that an integrated transportation/air quality planning process be used to identify effective TCMs and ensure their funding sources.<sup>17</sup>

In addition, the April 19, 2000 Memorandum of Understanding (MOU) between FHWA/FTA/EPA provides a three-page appendix on advancing TCMs during a lapse (See Appendix O). In short, TCMs may be advanced during a conformity lapse provided they are included in an Interim plan and TIP, and are contained in an EPA approved SIP with identified emissions reductions benefits.

#### **STATUS OF REGIONALLY SIGNIFICANT NON-FEDERAL PROJECTS DURING A CONFORMITY LAPSE**

The transportation conformity rule allows regionally significant non-federal transportation projects to proceed during a transportation plan/TIP conformity lapse by recipients of Federal funds, provided the

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<sup>15</sup> 40 CFR §§93.120(a) and 93.120(b), as amended by 62 FR 43813, Aug. 15, 1997.

<sup>16</sup> 40 CFR §93.120(b), as amended by 62 FR 43813, Aug. 15, 1997.

<sup>17</sup> 60 FR 57180, EPA's Nov.14, 1995 Amendments.

project was approved prior to the lapse. Non-federal projects are projects which are funded or approved by a recipient of Federal funds designated under Title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53) but which do not rely at all on any FHWA/FTA funding or approvals.

The March 2, 1999 Court ruling does not affect the general implementation of non-federal projects. However, the ruling does eliminate the narrowly-targeted flexibility from the 1997 conformity rule which had allowed non-federal projects to be approved during a lapse if they had been included in the first three years of the previously conforming transportation plan and TIP (or supporting regional emissions analyses). In sum, the court requires regionally significant non-federal projects to be approved by the non-federal entity before a lapse in order to proceed during the lapse. Once approved, non-federal projects can proceed to construction, even during a lapse, as long as the project's design concept and scope doesn't change significantly.

### **Approval of a regionally significant non-federal project by the non-federal entity**

The definition on non-federal project "approval" is decided at the state and local level through the interagency consultation process and should be formalized in the area's conformity SIP. (The conformity SIP is required by 40 CFR 51.390, and includes area-specific conformity procedures tailored to local and state agency needs. The conformity SIP does not contain a motor vehicle emissions budget.) For example, some areas have defined "adopt or approve a regionally significant highway or transit project" to be one of the following actions:

- Ⓒ Policy board action or resolution that is necessary for a regionally significant project to proceed.
- Administrative permits issued under the authority of the agency, policy board, or commission for a regionally significant project.
- Ⓒ The execution of a contract to construct, or any final action by an elected or appointed commission or administrator directing or authorizing the commencement of construction of a regionally significant project.
- Ⓒ Providing grants, loans or similar financial support, for the construction of a regionally significant project.

EPA discussed defining non-federal project "approval" in the preamble to the November 24, 1993 transportation conformity rule: ..."EPA believes that adoption/approval is never later than the execution of a contract for site preparation or construction. Adoption/approval will often be earlier, for example, when an elected or appointed commission or administrator takes a final action allowing or directing lower-level personnel to proceed (58 FR 62205, November 24, 1993)."

Finally, to be approved, a regionally significant non-federal project must be included in a conforming plan/TIP and/or supporting plan/TIP regional emissions analyses prior to a conformity lapse. If EPA has

not approved the conformity SIP, the interagency consultation process should be used to determine the point of approval for non-federal projects.

## **IMPACTS ON MAINTENANCE AREAS OF SIP DISAPPROVAL ACTIONS AND SUBSEQUENT HIGHWAY SANCTIONS/CONFORMITY LAPSE SITUATIONS**

EPA clarified in the August 1997 amendments that consequences of SIP disapprovals only apply when control strategy SIPs are disapproved.<sup>18</sup> There is less need to apply lapse consequences for disapproving a maintenance plan, since an area could revert to using its attainment SIP budget for demonstrating conformity if a maintenance plan is disapproved. In addition, CAA sanctions do not apply to maintenance plan disapprovals.

## **QUESTIONS AND ANSWERS**

### **When can a project which requires federal approval, but no federal funding, be advanced during a conformity lapse?**

Whether or not federal funds are involved, if a project requires federal approval, the FHWA/FTA cannot grant the final approval until after the National Environmental Policy Act (NEPA) process is completed. Therefore, a project could proceed during the lapse only if all of the NEPA requirements are met and the final federal approval was granted before the lapse.

### **What are non-federal projects, and which ones are covered by the transportation conformity rule?**

A non-federal project is a highway or transit project which requires no federal funding or approval, but is funded or approved by an agency that routinely receives funds from FHWA or FTA. A state DOT or public transit agency would be an example of a routine recipient of federal funds. Only regionally significant non-federal projects are covered by the conformity rule. Interagency consultation is used to determine who are routine recipients of federal funds and whether a project is regionally significant. See 40 CFR 93.101 for the rule's definitions of "recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws" and "regionally significant project."

### **Can State or local governments continue to fund design and right-of-way projects during a conformity lapse even though they were notified by the FHWA Division Administrator of a halt in Federal funding during a lapse? What are the consequences?**

State and local agencies are encouraged to not continue with completion of the design and right-of-way acquisition projects with non-federal funds after the notification to stop Federal-aid highway funds becomes effective. If such phases are advanced, any costs incurred during this period (after the notification effective

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<sup>18</sup> 40 CFR Part 93, as amended by 62 FR 43796, Aug. 15, 1997.

date and before the re-establishment of conformity) will not be eligible for future Federal reimbursement, can not be used as soft match, nor can credit be received for the value of property under the provisions of 23 USC 323. For highway design and right-of-way acquisition projects that are being advanced under FHWA's Advanced Construction (AC) provisions, only those costs incurred prior to the notification effective date may be converted to a regular Federal-aid project, if a State so chooses, after the area establishes conformity. If the State and local agencies continue with non-federal funds during the lapse, projects will not lose eligibility for future Federal funding once conformity is re-established.

**When will a conformity freeze start in the case where a conditional approval converts to a SIP disapproval without a protective finding?**

Unlike other types of SIP actions, conditional approvals automatically convert to a SIP disapproval if the condition of EPA's approval is not met within a fixed period not to exceed one year. Therefore, a conformity freeze would begin immediately upon the conversion of a conditional approval to a disapproval without a protective finding.

However, EPA notes that conditional approvals, by their very nature, inform transportation agencies well in advance that future conformity consequences could result if the conditions of the approval are not met. Because transportation agencies will be aware of potential conformity impacts approximately one year before they could occur, EPA believes that the practical impact of not providing a delayed effective date in these cases will be minimal.